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In the Supreme Court of the United States

OCTOBER TERM, 1980

LEE LINTON, SORKIS J. WEBBE, FRED L. KENNEDY, ROBERT C. TINDELL, ALADDIN HOTEL CORPORATION, and DENNIS PIOTROWSKI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is a pretrial order denying a motion to dismiss a criminal indictment, brought on the ground that the misconduct of the government prosecutor and government agents before the indicting grand jury deprived the defendant of his Fifth Amendment right to indictment by an informed and unbiased grand jury, a final decision within the meaning of 28 U.S.C. §1291 and thus immediately appealable?

PARTIES IN THE COURT OF APPEALS

Each of the petitioners is a defendant in a criminal case pending in the United States District Court for the District of Nevada. Two additional parties are named as defendants in the District Court. They are James R. Comer and the Del E. Webb Corporation.

All eight defendants, including the two not appearing as petitioners here, filed a motion to dismiss the indictment on grounds of abuse of the grand jury process. Hearing on the motions was combined, and the motions were denied in the same order. All eight of the defendants filed notices of appeal from the order. The appeals were consolidated in the United States Court of Appeals for the Ninth Circuit. The Court of Appeals disposed of the combined appeals in a single *per curiam* opinion. Mr. Comer and the Del E. Webb Corporation do not appear as parties in this petition because their counsel have indicated they do not wish to seek review of the decision of the Court of Appeals in this Court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not been reported. The opinion is set out in full on the Appendix beginning at App. 1, infra.

The District Court issued a 23 page opinion on the merits of the defendants' motions to dismiss. That opinion has not been reported. The opinion is set out in full in the Appendix beginning at App. 5, infra.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION

The decision of the United States Court of Appeals was issued on December 1, 1980. These petitioners and the two defendants in the District Court who do not appear as parties in this petition duly filed motions for reconsideration. Reconsideration was denied by an order entered on January 20, 1981. The order is set out in full in the Appendix at App. 4, infra. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."

28 U.S.C. §1291 provides in relevant part:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States , . . . except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

This case began its formal existence on December 4, 1979, when a special grand jury sitting in Las Vegas, Nevada returned two related indictments. One indictment was entitled *United States of America* v. *Lee Linton, et al.*, Case No. LV-79-83 (since changed to Case No. R-80-24). That indictment names as defendants six individuals, Lee Linton, Sorkis J. Webbe, Fred L. Kennedy, Robert C. Tin-

dell, Dennis Piotrowski, and James R. Comer, and two corporations, the Aladdin Hotel Corporation and the Del E. Webb Corporation. It contains 43 counts charging conspiracy in violation of 18 U.S.C. §371 (Count 1); mail fraud in violation of 18 U.S.C. §1341 (Counts 2-13); wire fraud in violation of 18 U.S.C. §1343 (Counts 14-28); interstate transportation of property obtained by fraud in violation of 18 U.S.C. §2314 (Counts 29-37); Hobbs Act extortion in violation of 18 U.S.C. §1951 (Counts 38-39); a RICO count in violation of 18 U.S.C. §1962(c) (Count 40); and, against defendant Linton alone, three tax evasion counts in violation of 26 U.S.C. §7201 (Counts 41-43). The related indictment was entitled *United States of America* v. *Sorkis J. Webbe,* Case No. LV-79-82 (since changed to Case No. R-80-25). It charges Mr. Webbe with two counts of making false tax returns in violation of 26 U.S.C. §7206(1).

Following arraignment on September 14, 1979, the defendants below filed motions to dismiss the indictment, for severance, for various forms of disclosure of the grand jury proceedings, for bills of particulars and discovery, and motions for other forms of relief. Consideration of this set of motions was delayed pending decision of a motion filed by the government to disqualify the Honorable Roger D. Foley, District Judge, to whom the case was originally assigned. The motion to disqualify Judge Foley was referred to the Honorable Bruce R. Thompson, Senior District Judge for decision. On December 5, 1979, Judge Thompson denied the government's motion to disqualify Judge Foley.

On January 18, 1980, Judge Foley issued a minute order deciding the bulk of the defendants' motions. Trial on count one of the indictment, the conspiracy count, was severed from the trial of the remaining 42 counts in Case

No. LV-79-83. The other motions for severance, the motions to dismiss, and the motions for disclosure of the grand jury proceedings were denied. The motions for discovery and bills of particular were granted.

In response to the order granting discovery, the government turned over to the defendants 12 cartons of documents and indicated other material would be made available for review in the government's offices in the courthouse. Materials stored in the courthouse consisted of six file cabinets of paper and numerous cartons of records on microfilm. Included in the discovery material produced by the government were transcripts of the testimony of each of the witnesses who appeared before the indicting grand jury. The indicting grand jury heard the testimony of one citizen witness and three government agents. The government agents purported to summarize testimony and evidence presented to three prior grand juries.

Also included in the discovery material were the transcripts of the testimony of witnesses before the prior grand juries. Based in large part on a comparison between the evidence presented to the indicting grand jury and the evidence heard by the prior grand juries, the defendants below prepared and filed motions to dismiss the indictment. It is this set of motions which is the subject of the instant petition.

The indicting grand jury was told by the prosecutor in charge of the case that it would hear a complete and accurate summary of the evidence presented to the prior grand juries. The defendants below argued in their moving papers that the indicting grand jury heard perjured testimony from the government agent witnesses, that their testimony omitted any reference to the exculpatory evidence heard by the prior grand juries, and that their testimony was deceptively selective rather than complete and accu-

rate as promised. The defendant also argued that the manner in which the summary evidence was presented was calculated to deceive the indicting grand jury as to basic principles of criminal liability and that the prosecutions were vindictive.[1]

In addition to dismissal, the defendants' motions sought disclosure of the transcripts of the colloquy between the prosecutor and the indicting grand jury during those times when no witnesses were present. The government opposed the defendants' request for disclosure of the colloquy transcripts. Copies of the transcripts were filed with the trial court for an *in camera* inspection. The initial indication from the trial court was that the transcripts of colloquy would not be disclosed. Oral argument on the defendants' motions to dismiss was set for July 7, 1980. By this time, the case had been reassigned to the Honorable Edward C. Reed, Jr., United States District Judge.

A short time before the scheduled argument on the motions to dismiss, the District Court ordered disclosure of the colloquy transcripts. Transcripts of the witness testimony before the indicting grand jury totalled only 386 pages. The colloquy transcripts totalled 230 pages. The colloquy transcripts revealed additional material to support the arguments made in writing by the defendants. They also contained material which produced new argu-

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[1] Orders denying motions to dismiss criminal cases on the ground that the prosecution is vindictive are appealable pretrial in the Ninth Circuit. *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir. 1980). The Court of Appeals concluded that only petitioner Tindell clearly raised a vindictive prosecution claim in the district court. Petitioner Tindell's claim of vindictive prosecution was rejected by the Court of Appeals on its merits. This petition raises only the issue of the jurisdiction of the Court of Appeals over the grand jury abuse claims.

ments in support of the motions to dismiss. For the most part, the impact of the colloquy transcripts was argued orally at the hearing on July 7, 1980. The defendants argued that the colloquy transcripts contained additional instances of materially false and misleading statements of fact; that the government prosecutor acted repeatedly as an unsworn witness testifying to factual matters not mentioned in the testimony of any sworn witness; that the prosecutor provided the indicting grand jury with a running commentary laced with the grossest sort of insult, insinuation and innuendo that labeled the defendants as professional criminals involved in organized crime; and that the prosecutor repeatedly misinstructed the grand jury about basic principles of criminal liability.

The oral argument on the defendants' motions to dismiss consumed better than eight hours in the trial court. Reply arguments were filed in writing by the defendants and by the government within the next 48 hours. On July 23, 1980, the district court issued a written opinion denying the defendants' motions.[2] All eight of the defendants filed timely notices of appeal. The trial setting of the conspiracy count was vacated by the district court pending the outcome of the appeals.

Before the record or any briefs were filed, the government asked the Court of Appeals to summarily dismiss the appeals. The request was in the form of an "emergency"

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[2] Because the Court of Appeals never addressed the merits of the grand jury abuse claims, the petitioners do not discuss the merits of those claims in any detail in this petition. However, it is appropriate to point out that some of the abuses complained of by the petitioners are not discussed at all in the district court's opinion and that the petitioners believe that the district court's opinion does not accurately represent what actually occurred before the indicting grand jury as disclosed by the transcripts.

motion. The motion was supported only by a three-page affidavit of the government prosecutor which made bare assertions that the Court of Appeals was without jurisdiction, that the appeals were frivolous and that they were taken for purposes of delay. The motion was not supported by a memorandum of authorities or by any part of the record in the court below. The defendants responded with memoranda and portions of the record. On September 3, 1980, the Court of Appeals issued an order denying the government's motion. The same order directed that all nine appeals be consolidated.

After the briefs were filed, the consolidated appeal was set for oral argument on November 10, 1980. On October 28, 1980, the Court of Appeals issued an order directing the parties to argue the effect of the decision in *United States* v. *Garner*, 632 F.2d 758 (9th Cir. 1980), *cert. denied*. 49 U.S.L.W. 3618 (U.S. Feb. 23, 1981), on the question of the court's jurisdiction to consider the grand jury issue. Supplemental written arguments were filed on this question and the issue was the subject of the bulk of the oral argument. On December 1, 1980, the Court of Appeals issued its per curiam decision dismissing the appeals on the grand jury question for lack of jurisdiction.

BASIS FOR FEDERAL COURT JURISDICTION

This is a case brought by the government charging violations of the federal criminal statutes. The district court has jurisdiction over the case under 18 U.S.C. §3231.

The petitioners argued below that the Court of Appeals had jurisdiction under 18 U.S.C. §1291. The Court of Appeals disagreed and dismissed the appeals. Whether or not the Court of Appeals had jurisdiction under this statute is the issue presented by this petition.

REASONS FOR ALLOWANCES OF THE WRIT

I. Summary

Briefly stated, the petitioners request this Court to exercise its jurisdiction in favor of granting the writ for the following reasons:

The petitioners complained in the trial court that the acts of the prosecutor and government agents so poisoned the indicting grand jury that their right to indictment by an informed and unbiased grand jury was destroyed. The petitioners have a right not to be faced with the expense and agony of a criminal trial absent an indictment which meets Fifth Amendment standards. The issue raised by the petitioners meets all three of the criteria established by opinions of this Court for "collateral" matters which are appealable pretrial. The failure of the Court of Appeals to take jurisdiction over the merits of the petitioners' claims is in conflict with this Court's opinion in *Helstoski* v. *Meanor,* 442 U.S. 500 (1979).

These petitioners found themselves jurisdictionally barred from the appellate courthouse because of an opinion issued in another case while their appeals were pending. That case, *United States* v. *Garner,* 632 F.2d 758 (9th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3618 (U.S. Feb. 23, 1981), presented an issue of an entirely different character than the issue presented in this case. The opinion in *Garner* virtually concedes the existence of each of the criteria for a "collateral" order. The opinion refuses jurisdiction because of a fear of frivolous claims taken only for purposes of delay. The rationale of *Garner* is in conflict with the direction in *Abney* v. *United States,* 431 U.S. 651, 662 n.8 (1977), to deal with frivolous claims procedurally without posing a jurisdictional bar to legitimate claims.

II. Collateral Orders Appealable Pretrial

Ordinarily, orders rendered in federal court prior to a final judgment are not immediately appealable. However, some pretrial orders fall within a "collateral" order exception to this rule. The exception was first developed in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (refusal to require security from a plaintiff in a shareholder's derivative action). Since then, this Court has held a number of issues determined by pretrial order to be immediately appealable. *Stack* v. *Boyle*, 342 U.S. 1 (1951) (bail reduction); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964) (whether the Jones Act provided an exclusive remedy for the negligent death of a seaman and whether siblings were entitled to damages); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (certification as a class action and imposition of most of the costs of notice on the defendants); *Abney* v. *United States*, 431 U.S. 651 (1977) (double jeopardy); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (presentation of evidence of legislative acts to the indicting grand jury in violation of the Speech or Debate Clause).

This Court's opinions have established three criteria for determining whether a pretrial order is "collateral" and thus immediately appealable. First, the issue decided by the order must be completely collateral to the merits of the litigation, *i.e.*, that it has nothing to do with the facts that may be proven at the subsequent trial. Second, the order must be truly final in the sense that nothing that might occur at later stages of the litigation including the trial, will have any bearing on the resolution of the issue decided by the order. Third, refusal to consider the matter pretrial must threaten irreparable injury, *i.e.*, consideration of the issue after the trial would come too late to vindicate the rights involved.

III. Application of the Criteria

The first two criteria are largely mechanical in nature and the question of whether they are present ordinarily will be easy to determine. The irreparable injury criteria is the one that is the most difficult to apply. In *Abney,* the irreparable injury was clear. The double jeopardy clause protects a defendant from a second trial not just from multiple punishment. Abney was asserting a right to be free from any trial on the charge filed. Appellate review of this claim after the conviction would clearly come too late to protect his rights.

The question of irreparable injury was a little more difficult in *Helstoski.* Congressman Helstoski claimed that the indicting grand jury heard evidence of his legislative acts in violation of the Speech or Debate Clause. He was claiming a right not to be tried because the indicting grand jurors were poisoned by evidence that he was privileged not to have them consider. He could not assert a right to be free from any prosecution on the charges brought. In theory at least, the government might have presented its evidence without proof of his legislative acts to another grand jury and obtained an indictment for the same offenses. Thus, *Helstoski* makes it clear that irreparable injury may exist even when a criminal defendant is not claiming a right to be free from trial under any circumstances. It is enough if the claim is of a right to be free from trial as the case is then constituted.

One of the basic rights guaranteed to citizens is that they will not find themselves facing trial in federal court for an infamous crime based only on the decision of a prosecutor or a judge. Every citizen is entitled to the independent judgment of a group of his peers that the federal charges are well-founded before he may be forced to

defend before a petit jury. *Branzburg* v. *Hayes,* 408 U.S. 665, 686-88 (1972); *Ex parte Bain* 121 U.S. 1 (1887). Two weeks after the Court of Appeals issued its opinion in *Garner,* it issued an opinion in a case where the question was the pretrial appealability of a claim that a criminal defendant was faced with trial on an infamous crime without the buffer of a grand jury indictment. The case is entitled *United States* v. *Yellow Freight System, Inc.,* ..... F.2d ....., Nos. 79-1665 and 1666 (9th Cir. Oct. 17, 1980).[3]

Yellow Freight is a criminal prosecution of two corporations. One corporation was charged with giving and the other with receiving rate concessions in violation of the Elkins Act, 49 U.S.C. §41(1), (3) (1976). The prosecution was brought by information charging fifty counts. The corporations asserted that the prosecution was for infamous crimes and moved to dismiss because of the lack of an indictment. The trial court held the crimes were not infamous and denied the motion. The Court of Appeals concluded that the order denying the motion was immediately appealable. On the question of irreparable injury, the court said simply that the rights of the corporate defendants could not be adequately protected by a post-conviction appeal because their claim was of a right to be free from prosecution and not merely free from conviction. The defendants in *Yellow Freight* were not claiming they could never be prosecuted for the Elkins Act violations. They were only claiming the right not to be prosecuted without indictment, as the case was then constituted. The decision of the Court of Appeals is entirely consistent with this Court's opinion in *Helstoski.*

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[3] The opinion has not yet been reported and is set out in full in the appendix.

If a grand jury is given a fair opportunity to carry out its function of judgment independent of prosecutor and court, its decision to charge is largely unreviewable. *United States* v. *Costello,* 350 U.S. 359 (1956). But it must be given that fair opportunity to perform its function. The Fifth Amendment provides not merely the right to indictment. It provides a right to indictment returned by an informed and unbiased grand jury. *United States* v. *Dionisio,* 410 U.S. 1, 16-17 (1973); *Wood* v. *Georgia,* 370 U.S. 375, 390 (1962); *Stirone* v. *United States,* 361 U.S. 212, 218-19 (1960).

A prosecutor presenting a case to a grand jury can easily subvert their independence. When a grand jury is lied to, misled, or otherwise poisoned by the predatory tactics of the government's prosecutor, the function of the indictment process is lost. *See United States* v. *Samango,* 607 F.2d 877 (9th Cir. 1979); *United States* v. *Serubo,* 604 F.2d 807 (3d Cir. 1979); *United States* v. *Basurto,* 497 F.2d 781 (9th Cir. 1974); *United States* v. *Gold,* 470 F. Supp. 1336 (N.D. Ill. 1979). The petitioners were complaining of just these sort of predatory tactics in the instant case. Their claim was that the indictment process was a sham and no better than no indictment at all. To be consistent with this Court's opinion in *Helstoski,* the Court of Appeals should have taken jurisdiction over the petitioners' appeals.

IV. Dealing With Dilatory Appeals

The appeals in this case were dismissed because of the earlier decision in *Garner.* The *per curiam* opinion in the instant case merely states that the petitioners failed to adequately distinguish their case from *Garner.* This case and *Garner* were both pending in the Court of Appeals at the same time. *Garner* is a poor vehicle for determin-

ing whether a claim that a defendant has been deprived of his Fifth Amendment right to indictment by an informed and unbiased grand jury should be subject to pretrial appellate review.

The Court of Appeals in *Garner* virtually conceded the existence of all three criteria previously established by this Court for "collateral" orders appealable pretrial. The opinion expresses no disagreement with the defendant's argument that the trial court's decision was a complete and final determination of his claim of grand jury irregularities nor with his argument that the issue was separate from the question of the issue for trial—his guilt or innocence. The opinion stated that the issue of appealability turned on the third criteria, the question of irreparable injury.

In discussing the third criteria, *Garner* recognized that the Fifth Amendment creates a right not to be tried absent an indictment returned by an informed and unbiased grand jury acting independent of the prosecutor. The opinion does not suggest that this is an interest that can be adequately protected by a post-conviction appeal. Instead, the opinion rejected pretrial appealability because of its "pragmatic" conclusion that the claim made by *Garner* could be raised in every criminal case.

The *Garner* opinion characterized the claim made by the defendant there as an assertion that the evidence presented to the indicting grand jury was inadequate and incompetent because it was hearsay in nature. Once the issue was characterized in this fashion, the outcome was inevitable. Criminal defendants cannot challenge federal indictments on the ground that the evidence presented to the indicting grand jury was inadequate or incompetent because it was hearsay. *Costello* v. *United States, supra.* So long as the

grand jurors are neither biased nor misinformed, their decision that the evidence they heard was sufficient in quantity and quality is unreviewable. The characterization of the issue settled the question of irreparable injury. A criminal defendant claiming only about hearsay evidence before the grand jury can make no claim of irreparable injury. He can make no claim of injury at all.

Because of its characterization of the claim as one which was obviously frivolous, the Court of Appeals in *Garner* was led to ignore a basic principle that must be the starting point for the resolution of the question of appealability. In order to determine whether a particular issue is collateral and appealable pretrial, a court must start with the assumption that the appellant's motion in the trial court was well-founded and entitled him to relief. The question of jurisdiction cannot be resolved by considering the merits of the issue raised. "Appeal rights cannot depend on the facts of a particular case." *United States* v. *McDonald*, 435 U.S. 850, 857 n.6 (1978), quoting *Carroll* v. *United States*, 354 U.S. 394, 405 (1957). It is only after the question of jurisdiction is resolved in favor of appealability upon the premise that the merits of the claim are sound that the court can consider the merits of the claim.

The issues raised by the petitioners in this case are of a different character than the issue described in the *Garner* opinion. These petitioners are complaining of perjured testimony, of a deliberate misrepresentation to the indicting grand jury that it would hear a complete summary of the evidence before the prior grand juries, of unsworn testimony from the government prosecutor, of commentary laced with insult, insinuation and innuendo, and of repeated misinstructions on basic principles of law. Assuming, as a court must do in determining the issue of

jurisdiction, that all of these abuses occurred, the irreparable injury that results from the denial of pretrial review is substantive, concrete and immediate.

The "pragmatic" concern that led the Court of Appeals in *Garner* to decide against appealability was a belief that every criminal defendant could raise a claim like Garner's thus raising the specter of a flood of frivolous pretrial appeals which would seriously disrupt the processing of criminal cases in the trial courts. The type of issues raised by the petitioners in the instant case are not of a sort that could be raised by many criminal defendants prior to trial. The motions filed by the petitioners to dismiss the indictment were predicated on concrete examples of the grossest sort of abuse of the grand jury process. They were able to make these claims only after they had obtained access to the transcripts of all of the proceedings before the indicting grand jury and the transcripts of the testimony before the prior grand juries. Access to a complete set of grand jury transcripts prior to trial is not common in most criminal cases. Even in those cases where access to grand jury transcripts is provided, the petitioners assume that colorable claims of the kind of predatory tactics by the government's prosecutor that were involved in this case will be a rare event.

In *Abney* v. *United States,* this Court directed that frivolous claims are to be controlled by establishing screening procedures and not by denying jurisdiction over pretrial appeals to a whole category of claims. 431 U.S. at 662 n.8. Courts of Appeal have effectively used such techniques for this purpose. In *United States* v. *Burt,* 619 F.2d 831 (9th Cir. 1980), a panel of the Ninth Circuit Court of Appeals confirmed an order of the trial court (concededly appealable pretrial) four days after the notice

of appeal was filed. In *United States* v. *Barham,* 608 F.2d 602 (5th Cir. 1979), the Court disposed of a pretrial appeal on a double jeopardy claim by reviewing the memoranda and affidavits filed in the trial court in a conference telephone call with counsel for the parties. The trial court order was affirmed five days after the notice of appeal was filed. In *United States* v. *Lynch,* 598 F.2d 132 (D.C. Cir. 1978), *cert. denied,* 444 U.S. 846 (1979), the Court of Appeals heard oral argument on motions for summary reversal and summary affirmance two weeks after the notice of appeal was filed.

The Court of Appeals for the Ninth Circuit has established a process for dealing with frivolous pretrial appeals. In a memorandum dated July 7, 1980, addressed to all United States Attorneys and federal public defenders, the Clerk of the Court of Appeals for the Ninth Circuit outlined a procedure for expedited treatment of pretrial appeals in criminal cases through the emergency motion process that is provided for in Ninth Circuit Rule 6(h). The prosecutor in the instant case attempted to use this process to obtain summary relief. The attempt was not a serious one, however.

The government's "emergency" application to dismiss the instant appeals consisted of a two page motion and a three page affidavit. The affidavit did no more than state the prosecutor's conclusion that the appeals were frivolous and taken for purposes of delay. Counsel for the defendants, who were spread across the country from one coast to the other, were notified by regular mail delivery rather than by telephone. The submission by the government prosecutor did not include the telephone numbers for counsel for the defendants as required by the local rule. No memorandum of law was filed. None of the moving

papers, responses, and legal memoranda filed in the trial court were supplied. The prosecutor did not even provide the Court of Appeals with a copy of the trial court's written opinion denying the motions.

The events in this case do not demonstrate that an expedited process for dealing with pretrial appeals in criminal cases is unworkable. The reason for the uninformative nature of the prosecutor's "emergency" motion was, we think, obvious. The prosecutor simply did not honestly believe that the appeals could be denominated frivolous and taken only for purposes of delay. The failure of a government prosecutor to use available procedures for expediting consideration of pretrial appeals is a ground for ignoring the directions in *Abney* to determine the question of appealability under an assumption that frivolous claims can be weeded out.

V. Conclusion

Many of the issues that are brought to this Court are of a sort which can best be decided after a series of decisions in the lower courts have considered the issue under various sets of factual circumstances. A sound judgment may be more possible after there exists a body of varying factual circumstances that put flesh on the bare bones of the issue. The issue presented in this case is not of that character. The question of jurisdiction must be determined under the assumption that the petitioners' claim in the trial court was well-founded. Beginning with that assumption, the factual predicate for the issue of pretrial jurisdiction is that a criminal defendant has been deprived of his Fifth Amendment protection of indictment by an unbiased and informed the grand jury through the predatory tactics of a government prosecutor. The factual predicate will not alter the next time the issue arises.

The issue is ripe for decision now. The decision of the Court of Appeals abandons important constitutional protections to the interest of expediency in a manner rejected by prior opinions of this Court. For those reasons, these petitioners respectfully request the Court issue a writ of certiorari.

Respectfully submitted,

.....

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And on behalf of counsel
for petitioners Linton, Webbe,
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APPENDIX

I. **Opinions and Orders in This Case**

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(December 1, 1980)

UNITED STATES OF AMERICA,
Appellee,

vs.

LEE LINTON, SORKIS J. WEBBE, FRED L. KENNEDY, ROBERT C. TINDELL, ALADDIN HOTEL CORPORATION, DENNIS PIOTROWSKI, DEL WEBB CORPORATION, and JAMES C. COMER,
Appellants.

Nos. 80-1548 to 80-1555, and 80-1564

OPINION

Appeal from the United States District Court
for the District of Nevada

Edward C. Reed, Jr., District Judge, Presiding

Argued and submitted November 10, 1980

Before: GOODWIN and SCHROEDER, Circuit Judges, and HARDY,* District Judge

PER CURIAM

These interlocutory appeals were filed under *Abney* v. *United States*, 431 U.S. 651 (1977). Appellants complain

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* The Honorable Charles L. Hardy, United States District Judge for the District of Arizona, sitting by designation.

about the conduct of the prosecutor and the use of perjured testimony before the grand jury. This court recently held that motions alleging "grand jury irregularities" are not appealable. *United States* v. *Garner,* No. 79-1802 (9th Cir. Oct. 6, 1980). Appellants have demonstrated no reason to distinguish this case from *Garner.* Thus, we dismiss these appeals alleging prosecutorial misconduct and the use of perjured testimony before the grand jury for lack of jurisdiction.

Moreover, we affirm the district court's dismissal of Tindell's vindictive prosecution claim.[1] The district court did not abuse its discretion in concluding that Tindell did not present sufficient facts to prevail on this issue.

The vindictive prosecution appeal in reality is nothing more than the *post hoc ergo propter hoc* fallacy.[2] The proposition asserted is that any nontarget grand jury witness who claim the privilege against self-incrimination can thereafter never become a target no matter what the ongoing investigation uncovers; this is so preposterous on its face as to require no discussion. This is not a case in which the prosecutor reindicted on a more serious charge after the defendant asserted constitutional rights in the course of an ongoing prosecution. *See Blackledge* v. *Perry,* 417 U.S. 21 (1974); *United States* v. *Griffin,* 617 F.2d 1342 (9th Cir. 1980). There was a total absence of proof in this case that the prosecutor had proceeded against Tindell because he had exercised a constitutional right. In the absence of a strong showing of the causal connection between

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[1] We do not consider appellant Piotrowski's "vindictive prosecution" claim because we find that he did not raise it below and thus we have nothing to review.

[2] The fallacy is that a subsequent event is an effect of a prior event.

the exercise of the right and the prosecution, there is no threshold fact to trigger the *Griffin*[3] inquiry, either in the trial court or upon *Abney* review in this court.

The district court's dismissal of Tindell's vindictive prosecution claim is affirmed. Each of the other appeals is dismissed without prejudice to preserving on appeal from a final judgment any nonfrivolous claim of a denial of due process.

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[3] *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir. 1980).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(January 20, 1981)

UNITED STATES OF AMERICA,

Appellee,

vs.

LEE LINTON, SORKIS J. WEBBE, FRED L. KENNEDY, ROBERT C. TINDELL, ALADDIN HOTEL CORPORATION, DENNIS PIOTROWSKI, DEL WEBB CORPORATION, and JAMES C. COMER,

Appellants.

Nos. 80-1548 to 80-1555, and 80-1564

ORDER

Before: GOODWIN and SCHROEDER, Circuit Judges, and HARDY,* District Judge

The panel in the above case has voted to deny the petition for rehearing. Judges Goodwin and Schroeder have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge has requested a vote. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Charles L. Hardy, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

(July 23, 1980)

UNITED STATES OF AMERICA,

Plaintiff,

vs. CR-R-80-24-ECR

LEE LINTON, et al, ORDER

Defendants.

Defendants Del E. Webb Corporation (DEW), Aladdin Hotel Corporation (Aladdin), Sorkis J. Webbe, Fred L. Kennedy, Robert C. Tindell, Dennis Piotrowski, and James R. Comer have moved to dismiss the indictment in this action. The principal grounds advanced for these motions are the Fifth Amendment to the United States Constitution and the Court's inherent supervisory power, as recently discussed in *United States* v. *Samango,* 607 F.2d 877 (9th Cir. 1979). An extensive hearing has been held on the motions by the Court which now renders its decision on the same.

A forty-three count indictment was returned by the Special Grand Jury on September 4, 1979, after meeting with the government prosecutor and receiving evidence including live oral testimony on five separate occasions. The indictment avers violations of Title 18 of the United States Code §§ 371, 1341, 1343, 2314, 1951, 1962(c), as well as Title 26 § 7201. The crimes alleged to have been committed

include mail and wire fraud, interstate transportation of money with intent to defraud, conspiracy to commit the three aforesaid offenses, interference with commerce by extortion, conducting of an enterprise through a pattern of racketeering activity and several counts of tax evasion as to defendant Lee Linton only. Defendants DEW and James R. Comer are only charged in Count I, the conspiracy count of the lengthy indictment.

The gravamen of the Government's case as alleged in the indictment is that the eight named defendants were each involved in a scheme whereby portions of the proceeds from loans made by the Pension Fund of the Teamsters Union for the purpose of financing a construction project at the Aladdin Hotel in Las Vegas were secretly and improperly diverted by the defendants. The defendant DEW was the general contractor in the Aladdin construction project. Lee Linton was project architect for the Aladdin; Fred L. Kennedy was inspecting architect for the Pension Fund; Sorkis J. Webbe was general counsel for the Aladdin; James R. Comer was a corporate officer for DEW; while Dennis Piotrowski and Robert C. Tindell were employees of the Aladdin.

The alleged scheme involved, inter alia, a complex series of transactions initiated by the defendants whereby subcontractors on the construction project were induced to enter into contracts for inflated amounts, thus allowing for "kickbacks" to be routed directly back to some of the defendants, as well as to sources designated by some of the defendants. Such funds were to be paid subsequent to the submission of pay requests to the Pension Fund ostensibly for work completed.

The case was submitted to the indicting grand jury under what the Government concedes was ". . . a slightly unusual

set of circumstances . . .". Investigation in this case involved testimony and evidence presented to a regular federal grand jury in Tucson, Arizona, as well as regular and special federal grand juries sitting in Las Vegas over the course of approximately two-and-one-half years. No indictments were ever returned by any of the previous grand juries investigating the case. In June, 1979, the term of the Las Vegas Special Grand Jury then investigating the matter was about to expire. An extension for the term of that grand jury was sought by the Government but denied by the Court. A new Special Grand Jury was then impaneled on August 8, 1979. Testimony and evidence in this matter was then presented to the new grand jury which returned the subject indictment after meeting on August 14, 21, 27, 28 and September 4, 1979.

Three Government agents appeared as witnesses before the indicting grand jury and explained and summarized the evidence and testimony of the some 150 witnesses who had appeared before the prior federal grand juries investigating the case. In addition, Charles Chuckray, Director of Loan Administration for the Pension Fund, gave testimony in respect to voluminous records and documents regarding the subject loan transactions. Transcripts of testimony of witnesses who appeared before prior grand juries were made available to the indicting grand jury. Numerous exhibits were also presented.

It is the position of the defendants that the summary procedure utilized by the Government in presenting its case to the grand jury was so abused as to constitute a totally unjustifiable manipulation of the indicting grand jury all to the prejudice of the defendants. This allegedly manipulative and improper procedure, according to the movants, was primarily accomplished in two ways:

1. By a highly selective and deceptively prejudicial summary of only a fraction of the prior grand jury testimony and evidence; and

2. Through knowing use of material false testimony by a Government agent.

Additional grounds submitted by defendants in these motions will also be addressed.

Here, as in *United States* v. *Samango,* 607 F.2d 877 (9th Cir. 1979), the case relied on most heavily by the defendants in bringing these motions, the defendants contend "... that the prosecutor's behavior was so improper and prejudicial that it created a biased grand jury."

In support of their motions the defendants point to numerous examples of what is asserted as prosecutorial misconduct during the course of proceedings before the indicting grand jury and further have designated several portions of testimony given before the special grand jury as false. Among these the major points are that:

1. The Government never informed the indicting grand jury of a credibility problem with a principal government witness appearing before a previous grand jury whose testimony was included in the summaries given. Donald H. Bayles was a former employee of defendant DEW who was purportedly hospitalized and diagnosed as suffering from depressive neurosis (acute) and acute paranoid schizophrenia soon after the events which were the subject of his testimony occurred.

2. The defendant DEW agreed to pay a finder's fee to William Morris, an attorney in Kansas City. The Government's presentation implied that the agreement was useless and was designed to hide an unearned

commission since the defendant DEW already knew of the Aladdin project, and that it was not paid simply because William Morris died. Defendant maintains that undisputed evidence presented before prior investigating grand juries was that the purpose of the agreement was to allow defendant DEW to negotiate a bid contract with the Aladdin to be general contractor on the construction project without competitive bidding. Defendant also asserts that a Government agent deceptively testified before the indicting grand jury that there were no other serious bidders on the job.

3. The Government agents testimony deceptively indicated that more than one finder's fee agreement was prepared by the Aladdin and that "at the time these documents [for a second finder's fee agreement] were prepared, Donald H. Bayles, house counsel for DEW, resigned out of conscience."

4. Testimony by the Government agent before the indicting grand jury misleadingly implied that a $225,000.00 redesign architect fee included in the general contractor contract between defendant DEW and Aladdin was unusual and was intended by the parties as a means of paying kickbacks. Such testimony also included the false statement that the redesign architect fee was included in the contract contrary to the advice of a DEW legal advisor.

5. Government agent Cohen also falsely testified that defendant Comer, a corporate officer of DEW, signed letters of intent to subcontractors which included amounts for kickbacks and that DEW submitted pay requests to the Pension Fund which included amounts for kickbacks.

6. That agent Cohen also falsely testified that prior evidence submitted showed that $900,000.00 was diverted to the architect on the job and the *general contractor.*

7. The Government misled the indicting grand jury by presenting summary testimony calculated to have the grand jury believe that any act by a person purportedly acting on behalf of the corporation was an act of the corporation without further informing the grand jury that a corporation need benefit from the criminal acts of its agents in order to be held criminally liable.

8. The inclusion of defendant Tindell in the instant indictment is the result of prosecutorial vindictiveness in that subsequent to being told that he was not then a target of the investigating grand jury, Tindell appeared and testified before the grand jury and invoked his Fifth Amendment right against self-incrimination. The attitude of the Government toward him then changed and Tindell was indicted along with the other defendants in this case.

9. The defendants were prejudiced by a general discussion of organized crime occurring between the prosecutor and the grand jury immediately prior to the Government's presentation of evidence in this case before the indicting grand jury.

10. The Government prosecutor improperly appeared as an unsworn witness before the indicting grand jury.

> "The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries. But neither the Fifth Amendment nor any other constitutional provi-

> sion prescribes the kind of evidence upon which grand juries must act." *United States* v. *Costello,* 350 U.S. 359, 361, 76 S.Ct. 406 (1956).

"Implicit in the above stated Fifth Amendment provision is the guarantee that a grand jury which presents or indicts will be fair and unbiased." *United States* v. *Gold,* 470 F.Supp. 1336, 1345 (N.D.Ill. 1979).

As accurately stated in *United States* v. *Basurto,* 497 F.2d 781, 785 (9th Cir. 1974), "Today, the grand jury relies upon the prosecutor to initiate and prepare criminal cases . . . which come before it." Professor Moore thoughtfully has written that, "The passive role of the modern grand jury is perhaps an inevitable function of our complex urban society. Nevertheless, at its best the grand jury is capable of acting as something more than a rubber stamp." 8 Moore, *Federal Practice,* ¶6.02[1] 6-12 (1976). "Thus, *Costello* stands only for the proposition that courts should not inquire into the substance of the evidence presented to the grand jury. Courts can still play a role, however, in ensuring the fairness and independence of that body." *United States* v. *Leverage Funding Systems, Inc.,* 478 F.Supp. 799 (C.D.Calif. 1979).

In recent years the Ninth Circuit has become more willing to review serious allegations involving prosecutorial misconduct and to dismiss an indictment where such action is necessary "to protect the integrity of the judicial process." *United States* v. *Chanen,* 549 F.2d 1308 (9th Cir. 1977). Such dismissals have been based either on constitutional grounds, *United States* v. *Basurto,* supra, or on the court's inherent supervisory power, *United States* v. *Owen,* 580 F.2d 365 (9th Cir. 1978), *United States* v. *Samango,* supra, or both, see *United States* v. *DeMarco,* 401 F.Supp. 505 (C.D.Calif. 1975), *United States* v. *Roberts,* 81 F.Supp. 1385 (C.D.Calif. 1980).

It was in the concurring opinion of Judge Hufstedler in *United States* v. *Basurto,* 497 F.2d at 793, that use of the court's inherent supervisory power in a context similar to the instant case was suggested initially in this circuit where:

> "A supervisory rule requiring a prosecutor who learns before trial that an indictment is based in some material way on perjured testimony to seek dismissal of the tainted indictment would safeguard the grand jury's role as mediator between prosecutor and potential defendant."

In *United States* v. *Owen,* supra, the use of the court's supervisory power in such a context involving Governmental misconduct was adopted so that now ". . . dismissal is used as a prophylactic tool for discouraging future Governmental impropriety of a similar nature." As later held by the court in *United States* v. *Samango,* supra, 607 F.2d at 884, the Government's use of perjured testimony is not necessary in order to invoke the court's supervisory power in that "The facts of each case determine when Government conduct has placed in jeopardy the integrity of the criminal justice system."

While the Supreme Court has not yet announced a general rule regarding application of the Court's inherent supervisory authority, "numerous rationales have been advanced to explain the nature and scope of the somewhat sparingly used supervisory authority, but it is generally conceded ". . . that the courts are primarily concerned with protecting the judicial process from the stigma of illegal or unfair government conduct.' " *United States* v. *Narciso,* 446 F.Supp. 252, 302 (E.D.Mich. 1976).

It is also important to note that the drastic nature of the harsh remedy provided by the court's exercise of its supervisory powers in dismissal of an indictment based on

prosecutorial misconduct ". . . renders it essential that they not be applied indiscriminately to remedy every prosecutorial misstep." *United States* v. *Baskes,* 433 F. Supp. 799, 806 (N.D.Ill. 1977), *accord: United States* v. *Dondich,* 460 F.Supp. 849 (N.D.Calif. 1978). As such, the policy of the federal courts is that of reluctance to interfere in the orderly functioning of grand jury proceedings and the rule in the Ninth Circuit as found in *United States* v. *Chanen,* 549 F.2d 1306 (9th Cir. 1977), is that:

> "Nevertheless, given the constitutionally-based independence of each of the three actors—courts, prosecutor and grand jury—we believe a court may not exercise its 'supervisory power' in a way which encroaches on the perogatives of the other two unless there is a clear basis in law and fact for doing so."

It is also the law in this circuit that in order to obtain a dismissal of an indictment based on serious prosecutorial misconduct that, "there be some prejudice to the accused by virtue of the alleged acts of misconduct." *United States* v. *Owen,* 580 F.2d 365, 367 (9th Cir. 1978).

In *United States* v. *Chanen,* supra, 549 F.2d at 1309, the court also observed that: "Almost every court dealing with the issue raised here has confronted a novel set of facts. The range of prosecutorial conduct capable of inspiring allegations of unfairness appears unlimited." Here as in *United States* v. *Samango,* supra, 607 F.2d at 884, the defendant advances the argument that the cumulative effect of the acts and indiscretions herein described, ". . . none of which alone might have been enough to tip the scales, operated to the defendant's prejudice by producing a biased grand jury."

It is significant to note at the outset that both *Samango* and *Chanen* were cases which involved multiple indictments. Although investigation of the instant matter was

conducted over a substantial period of time and before several grand juries, only one indictment was ever presented and returned. The second indictment in *Chanen,* as here, was obtained entirely through use of hearsay evidence and the court found that dismissal was not necessary in order to preserve the integrity of the judicial process and to avoid any fundamental unfairness. The facts presented to the court in both *Chanen* and *Samango* differ materially from the instant case and in the eyes of this Court the level of prosecutorial misconduct, if it can be called that, in this case falls somewhere in between the gross indiscretions presented in *Samango* which the court found sufficient to dismiss and those in *Chanen* which were not.

The so-called "credibility problem" discussed by the court in *Samango* was but one of the elements found there by way of comparison as not being present in *Chanen.* Such a problem does not exist in this case. The defendants contend that Donald Bayles, one of the Government's principal witnesses who appeared before one of the prior grand juries, and whose testimony was included in the summary testimony presented to the indicting grand jury, was hospitalized and diagnosed as suffering from depressive neurosis and acute paranoid schizophrenia soon after the events with regard to which he testified. Apparently no evidence pertaining to the credibility of Bayles was ever presented to any of the grand juries which heard the matters involving this case.

It is well settled that the prosecutor need not present material bearing on credibility of witnesses appearing before the grand jury. *United States* v. *Thompson,* 576 F.2d 784, 786 (9th Cir. 1978), *Loraine* v. *United States,* 396 F.2d 335 (9th Cir. 1969), *United States* v. *Brown,* 574 F.2d 1274, 1276 (5th Cir. 1978). In *Chanen* a potential credibility

problem was averted as transcripts of testimony before previous grand juries was read aloud to the indicting grand jury but the prosecutor advised the grand jury that such witnesses had made statements inconsistent with the transcribed testimony.

Conversely, in *Samango,* 607 F.2d at 881, transcripts of the prior testimony of Government witnesses "were merely deposited with the grand jury, and the record does not show how much time the jurors spent with the transcripts nor whether they read them at all." Upon initially reading the above cited passage from *Samango* within its context it is easy to interpret disapproval by the Ninth Circuit of the practice of merely depositing transcripts of prior grand jury testimony with a grand jury without either reading such materials aloud or at least giving the body adequate time to review the contents thereof.

The real danger in *Samango,* though, is made clear in the District Court's opinion, *United States* v. *Samango,* 450 F.Supp. 1097 (D.C. Haw. 1978). It was not that the grand jury returning the second indictment did not read the deposited transcripts, but the possibility that they might have been prejudiced and misled by the contents of such transcripts. Testimony from a witness who had a long history of drug abuse which the district judge had found substantial reason to believe unreliable was also contained in the transcripts deposited with the grand jury in *Samango.* These circumstances differ greatly from the case at bar and this Court finds that the prosecutor was not obligated to present materials regarding Bayles' credibility to the indicting grand jury and that the Special Grand Jury was not overreached or deceived as to the Government's summary of Bayles' testimony before a prior grand jury.

The defendants concede that under *Costello* v. *United States,* supra, 350 U.S. 359 (1956), the Government may obtain a valid indictment based solely on the hearsay testimony of its agents. As such, an indictment may be obtained subsequent to only summary testimony being presented to the indicting grand jury. *United States* v. *Barone,* 584 F.2d 118 (6th Cir. 1978), *United States* v. *Gaskill,* 491 F.2d 981, 985 (8th Cir. 1974). There being no requirement for the Government to have presented the transcripts of the prior grand jury testimony summarized by Government agents before the indicting grand jury, the Court does not find as germane the issues raised by defendants as to the amount of time, if any, spent in reviewing the transcripts deposited. This is simply not a case such as *Samango* where the court was concerned not with whether the indicting grand jury might not have read prior grand jury transcripts deposited but rather the potentially prejudicial effects which might have resulted from the grand jury's actually having read the contents of such transcripts. As stated in *Costello,* "Neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act."

Of course, this finding does not affect our adherence to the long line of cases which recognizes the duty of good faith on part of the prosecutor with respect to the court, the grand jury and the defendant. See *United States* v. *Basurto,* supra, 479 F.2d at 786. The Court further recognizes, however, that the danger of creating a biased grand jury through a false or misleading summary of prior grand jury testimony is greater in a case where transcripts of the prior testimony is neither read aloud to or provided for review to the indicting grand jury. Neither does this finding affect the Court's present inquiry as to whether the specific instances designated by the defendants or this

motion constitute prejudicial misconduct on the part of the prosecutor which had the cumulative effect of creating a biased grand jury.

The defendants maintain that the testimony of the Government agent regarding the finder's fee agreement between defendant DEW and St. Louis attorney William Morris was calculatedly presented so as to imply that the agreement was intended to serve no useful purpose and was created to disguise unearned compensation as the defendant DEW had learned of the Aladdin job well in advance of entering in the agreement. A portion of the testimony by Government agent Jeff Cohen currently under attack follows:

> Q. Mr. Cohen, thank you for reading the letter. That purports, then, to be a letter memorializing a finder's fee for finding Del Webb Corporation as the general contractor and assisting in negotiations payable to a William Morris; is that correct?
>
> A. That's correct.
>
> Q. In your investigation, did you find any significant services performed by Mr. Morris or his law firm with respect to locating the Del E. Webb Corporation in negotiating the contract on their behalf?
>
> A. No, sir, to the contrary. In light of the memo that I just read prior to this agreement, it would appear that the Del Webb Corporation was well aware of this project almost six months prior to this agreement.

DEW asserts that unanimous prior grand jury testimony by DEW employees established that the finder's fee agreement was made strictly for the purpose of obtaining the job for DEW as general contractor on a negotiated contract rather than a competitive bid basis. DEW contends that the reason why the finder's fee was never paid was not because attorney Morris died, as stated in the

Government's summary testimony, but because the general contractor for the Aladdin job was obtained on a competitive bid basis.

It appears that the evidence presented on these points before prior grand juries was not unanimous. While a prosecutor has a duty to present to a grand jury evidence which clearly negates guilt, *United States* v. *Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D.Okla. 1977), the Government is not obligated to sift through all the evidence to find statements or documents that might be exculpatory. *Loraine* v. *United States*, supra, 396 F.2d 335, *United States* v. *Mandel*, 415 F.Supp. 1033 (D.C.Md. 1976), "The prosecutor does not have a duty to present defendant's version of the facts." *United States* v. *Olin Corporation*, 465 F.Supp. 1120 (W.D. N.Y. 1979).

Similarly, and for the same reasons, the bulk of defendant's contentions regarding Government testimony as to the motive and propriety for the inclusion of a clause in the general contract between the defendants Aladdin and DEW providing for a $225,000.00 "redesign fee" to be paid to the project architect, defendant Linton, are not significant. The Court does find, however, that the statement made by agent Cohen before the grand jury that the redesign clause was placed in the general contract "contrary to the advice of Del E. Webb Corporation's legal advisors," made at the conclusion of the presentation to the indicting grand jury was not based in fact.

Finally, the Court examines two other instances where summary testimony eilcited by the Government before the indicting grand jury contained substantial misstatements of fact. Both of these instances occurred during agent Cohen's second appearance before the indicting grand jury, where just prior to presenting the indictment the Government sought to summarize the criminal acts with which

each defendant was being charged. Agent Cohen stated that "James R. Comer, [vice-president of Del E. Webb] signed certain letters of intent which when executed, furthered the scheme to defraud the Fund." He also testified that "Facts gathered to date indicate that the Aladdin Hotel Corporation participated in diverting approximately $900,000.00 to their project architect and general *contractor.*" Contrary to the insistence of defendant, the Court finds that neither of these statements were made for the purpose of intentionally deceiving or misleading the grand jury and taken in toto such remarks do not constitute knowing use of perjured testimony before a grand jury.

In the second instance a careful reading of the indictment and testimony presented to the indicting grand jury reveals that the Government neither charged defendant DEW with nor did it attempt to show that DEW, the general contractor received any of the $900,000.00 which the Government claims was improperly diverted in this case. More importantly, it is also apparent that this statement was made during the Government's summary of acts attributable to the defendant Aladdin not DEW. Given this context the explanation contained in the affidavit of agent Cohen filed with this motion is all the more plausible. Cohen states that he meant to say that the facts indicate that $900,000.00 was diverted to the project architert and general *counsel* (defendant Sorkis Webbe) of the Aladdin, not the general contractor DEW.

Likewise, Cohen's statement that a corporate officer of Webb, Comer, signed letters of intent is an insignificant and technical misstatement. Evidence presented to the indicting grand jury showed that Comer did author one such letter of intent involving a contract with a subcontractor and also that he did initial a separate letter of intent which was actually signed by a subordinate, Robert

Whitacre. Other evidence presented to the grand jury also indicated that Comer signed other documents allegedly evidencing participation in the underlying fraud scheme.

Although none of the errors and misstatements discussed above, especially the representation that the architectural redesign clause was placed in the general contract against the advice of the defendant's legal counsel, are to be commended and can be viewed as anything other than unfortunate if not inexcusable mistakes, taken together these alleged errors do not constitute a case of serious prosecutorial misconduct. In *United States* v. *Scheufler*, 599 F.2d 893, 895 (9th Cir. 1978), a Government agent testified before a grand jury that the defendant had participated in marijuana and hashish transactions that had yielded large sums of money for him. In moving to dismiss the indictment the defendant alleged that the testimony questioned was improper and prejudicial but the court found that:

> "This testimony of [government agent] Anderson, even if attributable to the Government, fell far short of Government misconduct that we have held sufficiently egregious to require dismissal of the indictment."

Although it is clear that under *Samango* prosecutorial misconduct need not be intentional in order to mandate dismissal of an indictment the misstatements above discussed are not, standing alone, sufficient to require a dismissal of this action as to defendants DEW and Comer. This Court finds as did the court in *United States* v. *Vargas-Rios*, 607 F.2d 831, 835 (9th Cir. 1979), when also faced with prosecutorial misstatements before a grand jury on a motion to dismiss that:

> "This is not a case in which dehors the misstatements there was a complete absence of evidence before the grand jury."

The issue raised by defendant Aladdin regarding the failure of the prosecutor to inform the grand jury that the Aladdin need benefit from the alleged criminal acts of its agents in order to be liable in this action is a matter which should properly be presented to the trier of fact.

The thrust of the defendant's argument is that since the Aladdin is responsible for repayment of the sums borrowed from the Pension Fund that it is in fact a victim of the alleged scheme involving kickbacks paid out of the loans and diverted for purposes not relating to the construction project. The Government points out that the Aladdin benefited from the series of transactions questioned in that it had a highrise addition built. Whether the Aladdin was a victim or beneficiary of the events involved in this action necessarily involves a determination of facts and evidence which cannot now be made.

Defendant Tindell's position that the Government's inclusion of him in the indictment was the result of prosecutorial vindictiveness has been well supported by pertinent authority. Unfortunately, the defendant has only presented a vague factual background to support this claim. Thus, under these circumstances, neither the interests of justice nor the doctrine of "manifest justice" would require dismissal. Having not been presented with sufficient facts to decide this issue, defendant Tindell's claims on this point are also best left to the trier of fact. See *United States* v. *Olin Corp.*, supra, 465 F.Supp. 1120.

Subsequent to receiving transcripts of the prosecutor's colloquys with the indicting grand jury the defendants have now advanced two additional bases to support a finding of prosecutorial impropriety occurring before the indicting grand jury. Firstly, the defendants maintain that a brief discussion regarding organized crime between the

prosecutor and the grand jury, which took place just prior to when the indicting grand jury began taking evidence in this case, was extremely prejudicial to them.

A reasonable reading of the transcript reveals that the remarks made by the prosecutor about organized crime, taken in context, were entirely proper. Having been just recently impaneled it was logical that one of the grand jurors would ask the prosecutor for a definition of organized crime since the Special Grand Jury was impaneled solely for the purpose of hearing matters presented by the Las Vegas Strike Force. The remarks by the prosecutor were made strictly in response to a juror's question and were not intended to be applied to this action, which was then about to be presented. Rather, the prosecutor's remarks and the underlying question were regarding the general nature of the matters which the Special Grand Jury would be hearing over the course of its entire term. It would be difficult indeed to infer prejudice to these defendants in this instance.

Finally, the defendants have also pointed to portions of the colloquys and transcripts of testimony given before the indicting grand jury and now contend that the prosecutor acted in certain instances as an unsworn witness in rendering testimonial evidece before the indicting grand jury. Upon review of the relevant transcripts it is the court's view that this claim, too, is unfounded. Due to the complex nature of this case it is hardly surprising that the grand jurors frequently asked questions. While in most instances the prosecutor would attempt to answer, on several occasions he would instruct the grand juror that evidence submitted later in the Government's presentation would answer the question. Most importantly, it appears that in instances where the prosecutor did answer, the responses given consisted of information which was other-

wise presented to the grand jury in the from of sworn testimony and documentary evidence and not solely through the mouth of the prosecutor as the defendants seem to contend.

It is further apparent that the other points raised by defendants regarding evidence and testimony presented to the indicting grand jury as related to alleged misstatements by the prosecutor and Government witness give rise to questions of fact which will more properly be dealt with at trial. It is important to remember that an indictment is only an accusation. "The role of the grand jury is restricted to a find as to whether or not there is probable cause to believe that an offense has been committed." *United States* v. *Cox,* 342 F.2d 167, 171 (5th Cir. 1965).

A motion to dismiss an indictment does not provide a basis for a court trial of the disputed facts to determine whether or not the accused person is in fact guilty. Rather, the question, as posed in this case, is whether there is any cognizable reason to overcome the presumption of regularity which attaches to the Grand Jury indictment. *Costello* v. *United States,* 350 U.S. 359 (1956). The more specific question posed by movants here is whether they were given the benefit of a fair and unbiased grand jury. Movants have alleged that improperly prejudicial and selective summaries of evidence presented to prior grand juries were the basis of the present indictment and charge for that reason that the indicting grand jury was not fair and unbiased. The allegation of prosecutorial misconduct is founded in claimed prejudicial remarks and knowing use of perjured testimony by the Government.

As earlier stated, it takes a strong and definite showing of such claimed bias and misconduct before an indictment will be upset on the basis of these types of claims.

The use of summary evidence before a grand jury, in and of itself, is proper. *United States* v. *Costello,* supra. However, the grand jury cannot be deceived into believing it is receiving direct, rather than hearsay, summary evidence.

There are limitations, however, in presentation of summary evidence. Where summary witnesses are used, a problem may arise if the summaries are substantially incomplete. On a general basis the test would seem to be whether the summary is at least a reasonable overview of the subject matter of the evidence presented to the prior grand juries, or is, on the other hand, so outrageously deficient as to constitute a flagrant abuse so that the summary has no reasonable relationship to an understanding of what occurred before the previous grand juries.

More specifically, the test should be that the summary should not in a substantial way misstate relevant and crucial evidence to the extent that the grand jury is so misled that, in reviewing the summary, it cannot be deemed the fair and impartial body to which the accused is entitled.

In this case, while there are some errors in the summary testimony given, it cannot be said that there is such a substantial misstatement of the prior evidence that the indicting grand jury was so misled that it could no longer be deemed to be fair and unbiased. There were some things said by the prosecutor to the grand jury which probably would have been better left unsaid. But these statements by no means rise to the level of prosecutorial misconduct. There is no evidence of knowing presentation of perjured testimony, or of an intentional effort to mislead the grand jury. This case does not constitute a proper case for invoking the court's extraordinary power to dismiss an indictment, either under the Fifth Amend-

ment or pursuant to the court's inherent supervisory power. Upon consideration of the totality of circumstances present in this case it is clear that the Government did not pollute "the waters of justice", *Mesarosh* v. *United States,* 352 U.S. 1, 14, 77 S.Ct. 1 (1956), in presenting this case to the indicting grand jury. Dismissal of the indictment herein is simply not necessary, "to protect the integrity of the judicial process." Cf. *United States* v. *Asdrubal-Herrera,* 470 F.Supp. 939 (N.D. Ill. 1979).

IT IS HEREBY ORDERED that the within pending motions to dismiss the indictment be DENIED.

DATED: July 23, 1980.

/s/ Edward C. Reed

UNITED STATES DISTRICT JUDGE

II. Opinions in Related Cases

APPENDIX A.

UNITED STATES of America, Appellee,

v.

Roy Dalton GARNER, Appellant.

No. 79-1802.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 11, 1980.

Decided Oct. 6, 1980.

Rehearing Denied Nov. 19, 1980.

Appeal from the United States District Court for the District of Nevada.

Before KILKENNY and FARRIS, Circuit Judges, and BELLONI, District Judge.*

KILKENNY, Circuit Judge:

Appellant appeals from an order denying his motion to dismiss a seven count federal grand jury indictment charging him with: (1) violations of 18 U.S.C. § 1343 [fraud by wire]; (2) violations of 18 U.S.C. § 1952(a)(3) [interstate travel in aid of racketeering enterprise and use of interstate facility in the aid of a racketeering enterprise].

Appellant filed motions to dismiss the indictment on three grounds: (a) the indictment violated Garner's right

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* The Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

to be free from double jeopardy; (b) the indictment violated the Department of Justice's policy recognized in *Petite* v. *United States,* 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed. 2d 490 (1960); and (c) there were irregularities in the grand jury proceedings.

Briefly summarized the issues as outlined in the various counts of the indictment are: (1) Count I charges appellant and his accomplices with implementing a marked card system to defraud Harrah's Casino of substantial sums of money, of transporting that money across state lines, and using the telephone to make a call between Reno, Nevada, and Oxnard, California, in aid of the scheme, all in violation of the provisions of 18 U.S.C. §§ 1342 and 1343; (2) Counts II, IV and VI charge appellant and his accomplices with traveling and causing travel in interstate commerce on three occasions to carry on a business activity unlawful under Nevada law and in violation of 18 U.S.C. 1952(a)(2) and (3); (3) Counts III and V charge appellant with using the telephone to make interstate calls in aid of racketeering in violation of §§ 1952(a)(2) and (3), and Count VII charges that one of appellant's accomplices transported stolen money in interstate commerce in violation of 18 U.S.C. § 2314.

ISSUES

(1) Were the denials of the pretrial motions appealable orders?

(2) Should the indictment be dismissed on double jeopardy grounds?

(3) Whether the policy announced in *Petite* v. *United States, supra,* requires a dismissal of the indictment.

(4) Whether the district court erred in not ordering disclosure of certain grand jury materials.

DOUBLE JEOPARDY CLAIM

Inasmuch as appellant has not been tried, our initial question is whether the denials of his pretial motions are appealable orders. Generally speaking, such denials are not final judgments which are appealable. *United States* v. *Griffin,* 617 F.2d 1342 (CA9 1980). However, when a claim of double jeopardy is made in a pretrial motion to dismiss, the denial thereof is appealable. *Abney* v. *United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *United States* v. *Solano,* 605 F.2d 1141 (CA9 1979). Consequently, we are in a position to respond to appellant's double jeopardy claim. The claim, in our opinion, is without merit.

To support this claim, the appellant relies on an earlier trial and conviction in violation of 18 U.S.C. § 1343 [wire fraud]. He had used what is known to the trade as a "blue box" to enable him to place undetected long distance telephone calls which defrauded the Nevada Bell Telephone Company. Appellant argues that because his use of the telephone on two occasions in aid of the scheme to defraud Harrah's, which is the basis of Counts III and V of the indictment, also served to support his earlier "blue box" conviction, his constitutional right not to be subject to double jeopardy was violated. We disagree. His earlier conviction was for defrauding the telephone company. Here he is charged with an entirely different offense, using the telephone in aid of the racketeering scheme. Although both offenses undeniably involved common facts—the use of the telephone—the appellant has not thereby established that the rights conferred upon him by the double jeopardy clause have been violated.

In *Blockburger* v. *United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), the Supreme Court

stated that "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Surely this does not mean that whenever there exist any common facts between the facts supporting an earlier conviction and those which form the basis for a subsequent prosecution the second prosecution is barred by the double jeopardy clause. *See also, United States* v. *Rone,* 598 F.2d 564 (CA9 1979).

Under Counts III and V, brought under § 1952(a)(3), the government must prove the use of the telephone with the intent to aid an unlawful activity. The unlawful acitivity involved herein is a business enterprise involving gambling—*i. e.,* the scheme to defraud Harrah's Casino. Under § 1952(a)(3) the government must clearly prove facts that were unnecessary to support the earlier conviction. Under the earlier § 1343 charge the government was required to prove the use of the telephone to aid a scheme to defraud the telephone company. The use of the telephone for that purpose was not necessary to sustain the § 1952(a)(3) conviction. We conclude that there is no merit to appellant's double jeopardy claim.

JUSTICE DEPARTMENT POLICY

Appellant argues that he is entitled to the protection of the Justice Department's policy recognized in *Petite.* In *Petite,* the Supreme Court, at the request of The Solicitor General, remanded a case to the district court with instructions to dismiss the indictment on the ground that it was the policy of the Justice Department not to prosecute a federal case where there has been a state prosecution for substantially the same act or acts unless, for compelling

federal interest, The Attorney General recommends prosecution. In the instant case, appellant had been indicted in a Nevada state court for card cheating in violation of a Nevada statute. This indictment was later dismissed. Appellant argues that *Petite* requires the dismissal of the present prosecution.

Appellant's argument must be rejected. We have said that "Such arguments are not properly the subject of an *Abney* appeal. Even if the issue were before us, this court has held that a violation of the *Petite* policy does not compel the dismissal of a federal prosecution." *United States* v. *Solano,* 605 F.2d 1141, 1143 (CA9 1979).

ALLEGED GRAND JURY IRREGULARITIES

In his motion to dismiss the indictment on account of the grand jury irregularities, the appellant requested an order: (1) compelling disclosure of the sessions of the grand jury held to consider evidence leading to the indictment returned on April 26, 1979; (2) disclosure of the attendance of the grand jurors at each of the sessions; (3) upon such disclosure to dismiss the indictment upon the ground that it was returned by grand jurors who did not hear, evaluate, or deliberate upon the evidence presented to the grand jury; and (4) upon the further ground that the purpose of the grand jury as envisioned by the Fifth Amendment was defeated by the procedures utilized by the government in obtaining the indictment.

Appellant specifically complains that the jurors who indicted him did not hear the evidence. He claims that one grand jury heard the evidence and did not return a true bill and that there are indications in disclosures made by the government that a major portion of the testimony heard by the indicting grand jury was simply a recapitulation of the case presented to the first grand jury. Addi-

tionally, appellant asserts that the summary was submitted by a law enforcement agent who had inherited the case upon the retirement of another agent.

As a threshold matter we must consider whether the order denying appellant's motion to dismiss the indictment because of grand jury irregularities is appealable. Our jurisdiction is wholly statutory and so we must determine whether the order falls within the terms of the applicable statute—in this case 28 U.S.C. § 1291.

Section 1291 provides that "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." A final decision has long been regarded as a predicate to federal appellate jurisdiction. The finality requirement reflects the congressional policy to avoid the threats to efficient judicial administration incident to interlocutory or "piecemeal" appeals. And "[a]dherence to this rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the efficient and fair administration of the criminal law.' *DiBella* v. *United States, supra,* 369 U.S. 121 at 126, 82 S.Ct. 654 at 657." *Abney* v. *United States,* 431 U.S. 651, 657, 97 S.Ct. 2034, 2039, 52 L.Ed.2d 651 (1977).

The case with which the finality rule is stated, however, belies the difficulty of its application. The Supreme Court has noted that "[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 170, 94 S.Ct. 2140, 2149, 40 L.Ed.2d 732 (1974). Indeed, the Court's efforts to give the rule a "practical rather than a technical construction", *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949),

have on occasion led to some rather curious results. *See e.g., Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964).

Generally § 1291 requires that an order, to be appealable, must terminate the proceedings in the district court. Certain orders, however, which do not constitute final judgments fall within the "collateral order" exception articulated in *Cohen* and are, therefore, "final decisions" within § 1291.

Cohen was a stockholder's derivative action brought in a federal district court in New Jersey. Federal jurisdiction was premised upon diversity of citizenship. The defendant made a motion to require the plaintiff to post security for reasonable expenses incurred by the defense as was required by a newly enacted New Jersey statute. The district court determined that the state statute did not apply in the federal action and denied the motion. The court of appeals reversed and ordered the posting of security. The Supreme Court concluded that the court of appeals had properly assumed jurisdiction and affirmed on the merits.

Mr. Justice Jackson based the determination of appealability on several factors. First, the district court's order was a final disposition of the particular issue involved. It was not "tenative, informal or incomplete," in any sense. 337 U.S. at 546, 69 S.Ct. at 1225. Second, the issue was not simply a "step toward final disposition of the merits of the case." *Id.* And finally, review after final judgment would be ineffective because at that point the "rights conferred by the statute, if it [was] applicable, [would] have been lost, probably irreparably." *Id.* The statute was intended to prevent "strike suits" by requiring security for payment of reasonable expenses of the action was adjudged to be unsustainable. The protection this statute afforded

would have been lost if the defendant was required to proceed to trial without such assurances. Finally, the Court noted that the issue involved was a "serious and unsettled question." *Id.* at 547, 69 S.Ct. at 1226.

The Court concluded that "[t]his decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546, 69 S.Ct. at 1225.

More recently, in *Abney* v. *United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), the Court considered whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds satisfied the *Cohen* requirements. The Court, per Mr. Chief Justice Burger, concluded that such an order was indeed a "collateral order" within the "small class of cases" that are exceptions to the final judgment rule. First, an order denying a motion to dismiss on double jeopardy grounds is a complete and final rejection, in the trial court, of a defendant's double jeopardy claim. Second, a double jeopardy claim "is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." *Id.* at 659, 97 S.Ct. at 2040. Finally, the Court stated that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.* at 660, 97 S.Ct. at 2040. The double jeopardy clause is, in part, a guarantee against being put to trial twice for the same offense and this would be lost if a criminal defendant was forced to endure trial prior to appellate review.

The substantive double jeopardy claim presented in *Abney,* unlike the issue involved in *Cohen,* was not a serious and unsettled question.[1] The Court determined, however, that "the special considerations permeating", *id.* at 663, 97 S.Ct. at 2042, double jeopardy claims justified including another class of cases within the "small class of cases" that satisfy the "collateral order" exception. The Court acknowledged that "our holding may encourage some defendants to engage in dilatory appeals . . . . However, we believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy." *Id.* at 662 n. 8, 97 S.Ct. at 2042 n. 8.[2]

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[1] Some courts have emphasized the requirement that the issue involved be a serious and unsettled question. In *Weight Watchers v. Weight Watchers International, Inc.,* 455 F.2d 770, 773 (CA 2 1972), the Second Circuit said that "[a]nother important factor bearing on the application of the *Cohen* doctrine, . . . , is whether a decision will settle a point once and for all, as it did in the *Cohen* case, or will open the way for a flood of appeals concerning the propriety of a district court's ruling on the facts of a particular suit." The Second Circuit has recently debated the question of whether Cohen requires that a "collateral order" involve a serious and unsettled question. *Compare Armstrong v. McAlpin,* 625 F.2d 433, 438 439 and n. 11 (CA 2 1980) *with* 448-451 (Mulligan, J., concurring in part and dissenting in part).

[2] It should be noted that the *Abney* court expressly precluded the possibility of a court of appeals exercising pendent appellate jurisdiction. Each claim in a motion to dismiss must be treated separately. A claim is not appealable because brought in conjunction with a double jeopardy claim. Each claim, in order to be immediately appealable, must independently satisfy the "collateral order" exception.

Perhaps not surprisingly, the short period since the Supreme Court's decision in *Abney* has been marked by an increasingly large number of claims that various pretrial orders are immediately appealable as "collateral orders." The Supreme Court, in *United States* v. *MacDonald,* 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978) rejected an assertion that a pretrial order denying a defendant's motion to dismiss an indictment because of an alleged violation of his Sixth Amendment right to a speedy trial was a "final decision." After reemphasizing the importance of finality to judicial administration, especially in the criminal context, the Court proceeded to apply the criteria enunciated in *Cohen* and *Abney.*

First, the Court noted that the denial of a motion to dismiss on speedy trial grounds does not represent a complete and final rejection, in the trial court, of the defendant's claim. "The resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case. As is reflected in the decisions of this Court, most speedy trial claims, therefore, are best considered after the relevant facts have been developed at trial." *Id. at* 858, 98 S.Ct. at 1551. A defendant would have the opportunity to make a similar motion after trial—when prejudice could be better evaluated.

Second, the rejection of a speedy trial claim is not "collateral" to the principal issues at trial. The determination of a speedy trial claim is not independent of the outcome at trial—particularly since the question of prejudice to the defense is central to an analysis of a speedy trial claim.

Third, the right involved in *MacDonald* was unlike the rights asserted in *Cohen* and *Abney* in that its "legal and practical value . . . would [not] be destroyed if it were not vindicated before trial." *Id.* at 860, 98 S.Ct. at 1552. The

Court recognized that there was a "superficial attraction" to the contention that the right to a speedy trial involved a right not to be subject to a nonspeedy trial. However, "[u]nlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial." *Id.* at 861, 98 S.Ct. at 1553.

The Court asserted that the application of the *Cohen* and *Abney* analysis resolved the appealability issue. It then mentioned several policy considerations which "reinforced" its conclusion. Among these considerations was the fact that because there would inevitably be some delay between indictment and trial every defendant could make a pretrial motion for dismissal on speedy trial grounds, the denial of which would be immediately appealable. Unlike a double jeopardy claim, which requires at least a colorable showing of former jeopardy "there is nothing about the circumstances that will support a speedy trial claim which inherently limits the availability of the claim." *Id.* at 862, 98 S.Ct. at 1553. The Court concluded its analysis by saying that "we decline to exacerbate pretrial delay by intruding upon accepted principles of finality to allow a defendant whose speedy trial motion has been denied before trial to obtain interlocutory appellate review." *Id.* at 863, 98 S.Ct. at 1554.

In *Helstoski* v. *Meanor,* 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979), the Court again considered the scope of the "collateral order" exception, this time in the context of the speech or debate clause. Helstoski, a United States Congressman from New Jersey, had moved to dis-

miss an indictment on the ground that the indictment violated the speech or debate clause. This motion was denied. Helstoski petitioned the Third Circuit for a writ of mandamus directing the district court to dismiss the indictment. The court declined to issue the writ, holding that the indictment did not violate the speech or debate clause. The Supreme Court determined that mandamus was not the appropriate remedy because review had been available by direct appeal.

The Court found that the district court order rejecting the speech or debate clause claim was a "collateral order." The denial of the motion to dismiss was a final disposition, in the trial court, of that particular claim. Second, the speech or debate clause contention was wholly collateral to the merits of the charge against Helstoski. And because "the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves.' ", *id.* at 508, 99 S.Ct. at 2449, this right would be lost if Helstoski was exposed to prosecution prior to appellate review.

This court has recently held that the denial of a motion to dismiss an indictment on grounds of vindictive prosecution is an appealable order. *United States* v. *Griffin*, 617 F.2d 1342 (CA9 1980). *Griffin* involved a straightforward application of the *Cohen* criteria. Most importantly, we found that "a vindictive prosecution claim, like the *Abney* double jeopardy claim, involves a right to be free from prosecution itself, rather than merely the right to be free from a subsequent conviction. Thus, the vindictive prosecution doctrine is a limit on prosecutorial discretion, and goes to the very authority of the prosecution to hale the defendant into court in the first place." *Id.* at 1345-6.

In *In re Fendler,* 597 F.2d 1314 (CA9 1979), we considered whether an order denying a petition to conduct a *voir dire* of the grand jurors investigating appellant concerning their possible bias, prejudice or economic interest was appealable. We concluded that such an order was not appealable. In *Fendler* an indictment had yet to be returned and the instant case might appear to be distinguishable on that ground. However, the court indicated that such facts would not be a controlling factor on the question of appealability. We said "[t]here is no reason to depart from the policy against piecemeal appeals in this case. If and when an indictment is returned against appellant, he can raise his claims in a motion to dismiss the indictment, 28 U.S.C. § 1867(e) and Fed.R.Crim.P. 6(b)(2); *and since denial of such a motion is reviewable on direct appeal from a criminal conviction, denial of review now will not render review impossible.*" *Id.* at 1315 [Emphasis added]. Although this statement is not binding in this instance we believe that it cautions against an overbroad reading of *Cohen* and *Abney.*

In the instant case appellant contends that the order denying his motion to dismiss the indictment because of grand jury irregularities is appealable. Since the order is not "final" as that term is ordinarily construed appellant maintains that it is within the "small class of cases" that qualifies as a "collateral order." We note at the outset that the particular issue here in question is not appealable simply because brought together with the admittedly appealable double jeopardy claim. In light of *Abney's* rejection of the concept of pendent appellate jurisdiction we refuse to follow appellant's suggestion that we resolve all the issues presently before us simply because of the existence of the double jeopardy claim.

Appellant claims that the order herein involved satisfies the principles the Supreme Court articulated in *Cohen* and *Abney*. The district court's order was a complete and final determination of appellant's claim. And the issue involved is collateral to, and separate from, the principal issue at trial, *i. e.*, the guilt or innocence of the appellant. The question remains, however, whether the particular right involved would be "lost, probably irreparably" if immediate appellate review is not available.

The Fifth Amendment provides, in part, that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," U.S.Const. amend. V. The Supreme Court has said that "[t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone* v. *United States,* 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960).

> " '[T]he institution [grand jury] was adopted in this country, and is continued from considerations similar to those which give it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.' "

Ex parte Bain, 121 U.S. 1, 11, 7 S.Ct. 781, 786, 30 L.Ed. 849 (1886).

The right to an indictment by a grand jury is, therefore, intended to insure that one is not "held to answer" for an infamous crime unless an independent body standing between the prosecutor and the accused has determined that the accused should be required to do so. Here, appellant was indicted by a grand jury and so we are not required to address the appealability of an order denying a motion to dismiss on the grounds that an indictment allegedly required by the Fifth Amendment was wholly absent.

Appellant argues that because of alleged irregularities the purposes of the grand jury were not served. Appellant maintains that he has a right not to be prosecuted, not to be "held to answer," unless the grand jury proceedings were properly conducted. Otherwise, the grand jury will not have served its intended purpose of standing as a buffer between the accuser and the accused. Appellant is not asserting a right to be free from subsequent conviction because even if there was a dismissal there could be a reindictment. Appellant is asserting a right to be free from this prosecution because of the alleged grand jury irregularities. He asserts that later review would be meaningless because at that point he will have been forced to endure trial without the assurance that the grand jury had effectively served its intended purpose. The right not to stand trial unless indicted by a properly functioning grand jury will have been irreparably lost.

We admit the argument appellant advances has a "superficial attractiveness." We hold, however, that the order denying the motion to dismiss the indictment because of grand jury irregularities is not immediately appealable. Our conclusion is premised primarily upon pragmatic con-

siderations. The "collateral order" exception should be narrowly construed so that the exception does not swallow the finality rule. Although one may dispute the wisdom of the finality rule Congress had determined that, in most instances, a "final decision" is a predicate to the exercise of federal appellate jurisdiction. We are convinced that, especially in the criminal context, the policy against piecemeal appellate adjudication is sound and that the exceptions to the rule should be few. To allow an interlocutory appeal in this instance would create nothing short of chaos in the criminal justice system. We decline appellant's invitation to include this class of case within the "small class of cases" that satisfy the "collateral order" exception.

To hold the order here in question appealable would open the possibility for a pretrial appeal in nearly every criminal case. A claim like the one appellant is making—that the evidence before the grand jury was not adequate and competent, *i. e.* that it was hearsay evidence—would be available in nearly every instance.

In *Costello* v. *United States*, 350 U.S. 359, 363-4, 76 S.Ct. 406, 409, 100 L.Ed. 397 (1956), the Court rejected such claims and there said:

> "[p]etitioner urges that this Court should exercise its powers to supervise the administration of justice in the federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires

such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial."

Recently the Third Circuit in *In re Grand Jury Proceedings (Johanson)*, —— F.2d —— (CA3 1980), rejected a contention that the denial of a motion for an evidentiary hearing to learn who had divulged information to the news media in order to have them disqualified from participating in grand jury proceedings was an appealable order. The court said that "flawed grand jury proceedings can be effectively reviewed by this court and remedied after a conviction had been entered and all criminal proceedings have been terminated in the district court. [Citing *Costello*] . . . Because delayed appellate review will not irreparably deny Johanson his right to an impartial grand jury, (his conviction could be reversed if at a later stage we conclude the grand jury was tainted) the order is not reviewable immediately as a collateral order." *Id.* at .....

Mr. Justice Blackmun's observations in *MacDonald, supra,* are equally applicable here. Like a speedy trial claim, and unlike a double jeopardy claim, there is nothing about the circumstances of the type of claim involved herein that would inherently limit its availability. In every criminal prosecution a defendant could make a motion to dismiss because of the type of evidence presented to the grand jury and, under the rationale espoused by appellant, its denial would be immediately appealable. To allow an immediate appeal under these circumstances would bring about a disruption of the efficiency of the criminal justice system that we are unwilling to countenance.

CONCLUSION

The order of the district court denying the motion to dismiss on double jeopardy grounds is AFFIRMED. The order of the district court denying the motions to dismiss on *Petite* policy ground and on the basis of the alleged grand jury irregularities is not appealable. These claims may be asserted if the appellant is subsequently convicted. Accordingly, the appeal on the latter two issues is dismissed.

IT IS SO ORDERED.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

YELLOW FREIGHT SYSTEM, INC.,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

DUNCAN CERAMICS, INC., a corporation,
Defendant-Appellant.

Nos. 79-1665, 79-1666.

Argued and Submitted Aug. 11, 1980.

Decided Oct. 17, 1980.

Appeal from the United States District Court for the Eastern District of California.

Before KILKENNY and FARRIS, Circuit Judges and BELLONI,* District Judge.

FARRIS, Circuit Judge:

Yellow Freight System, Inc., and Duncan Ceramics, Inc., appeal the district court's denial of various pretrial mo-

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* Honorable Robert C. Belloni, U. S. District Judge for the District of Oregon, sitting by designation.

tions to dism ss informations filed against them. Appellee United States moves to dismiss the appeals for lack of appellate jurisdiction. We dismiss in part and affirm in part.

On November 30, 1977, the United States served Yellow Freight and Duncan Ceramics with summonses and filed informations alleging that on fifty occasions Yellow Freight knowingly gave and Duncan Ceramics knowingly received rate concessions on interstate shipments of goods. The Elkins Act proscribes rate concessions and imposes a penalty of $1000 to $20,000 fine and up to two years' imprisonment in a penitentiary for granting or receiving rate concessions. 49 U.S.C. § 41(1), (3) (1976).[1]

On April 3, 1979, Yellow Freight and Duncan Ceramics filed a set of motions in the district court to dismiss the informations. In part these motions claim that the Elkins Act does not apply to motor carriers. In addition, however, this set of motions alleges that the informations are procedurally insufficient because (1) the crimes alleged are infamous and therefore must be prosecuted by grand jury indictment and (2) in any event the prosecution may not proceed without a preliminary determination of probable cause. The district court denied these motions.

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[1] The Act of October 17, 1978, Pub.L. No. 95-483, 92 Stat. 1337, recodified the substantive provisions involved in this case. Prior to this Act, the Elkins Act was codified at 49 U.S.C. §§ 41-43 (1976), but title 49 was not enacted as codified. The penal provisions of the Elkins Act now appear at 49 U.S.C. § 11903. Because the crimes charged allegedly took place before the 1978 Act, we use the 1976 codification in referring to the Elkins Act. The 1978 Act did not, however, purport to make any changes in substantive law. *See* Act of Oct. 17, 1978, Sec. 3(a), Pub.L. No. 95-473, 92 Stat. 1337, 1466.

I. *Appellate Jurisdiction*

Yellow Freight and Duncan Ceramics seek to base appellate jurisdiction on 28 U.S.C. § 1291 (1976), which grants appeals of right from "final decisions of the district courts." Specifically, they attempt tto characterize the denial of their second set of motions as a "collateral order" appealable as a final decision under the rationale of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949).

As applied to criminal pretrial orders, this rationale confers appellate jurisdiction when:

1. The pretrial order fully disposed of the appellants' claim;

2. The appellants' claim is collateral to, and separable from, the principal issue of guilt or innocence; and

3. The order involves an important right that would be lost if review had to await final judgment.

See Abney v. *United States*, 431 U.S. 651, 658-62, 97 S.Ct. 2034, 2039-41, 52 L.Ed.2d 651 (1977); *United States* v. *Griffin*, 617 F.2d 1342, 1344-46 (9th Cir. 1980). Inquiry into the immediate appealabality of a particular pretrial order must focus upon each claim asserted. Thus immediate appealability of one of the defendants' claims will not confer pendent appellate jurisdiction over defendants' other claims. *Abney* v. *United States*, 431 U.S. 651, 662-63, 97 S.Ct. 2034, 2041-42, 52 L.Ed.2d 651 (1977).[2] Accord-

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[2] Citing C. A. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3937, at 58 n.5 (Supp. 1980), Duncan Ceramics contends that *Abney* imposed no blanket prohibition of pendent appellate jurisdiction but merely held that pendent review was in-

(footnote continued)

ingly, the threshold issue of appellate jurisdiction must be addressed for each of the three claims asserted by the defendants, Yellow Freight and Duncan Ceramics.

A. *Elkins Act Contention.*

Yellow Freight and Duncan Ceramics claim that the particular provisions of the Elkins Act asserted in this case do not apply to motor carriers is not immediately appealable. The issue is "plainly not 'collateral' in any sense of that term." *Abney,* 431 U.S. at 663, 97 S.Ct. at 2042. It "may be reviewed effectively, and, if necessary, corrected if and when a final judgment results." *Id.* We accordingly grant the motion to dismiss the appeal as to the defendants' substantive claim.

B. *Indictment Clause Contention.*

Yellow Freight and Duncan Ceramics contend that they have been charged with an infamous crime for which they may not, under the indictment clause of the Fifth Amendment, be "held to answer" except upon grand jury indictment. This claim meets all three of the standards for immediate appealability. Denial of defendants' motion completely and finally determined their claim in the trial court. Allowing the trial to progress so that facts may develop will not facilitate consideration of their claim. *Cf. United States* v. *MacDonald,* 435 U.S. 850, 98 S.Ct. 1547,

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(footnote continued)

appropriate in that case. Subsequent cases have not adopted so narrow a reading of *Abney. See, e.g., United States* v. *MacDonald* 435 U.S. 850, 857 n.6, 98 S.Ct. 1547, 1551 n.6 56 L.Ed.2d 18 (1978); *United States* v. *Klein,* 582 F.2d 186, 196 (2d Cir. 1978), *cert. denied,* 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979); *United States* v. *Cerilli,* 558 F.2d 697, 699, 700 (3d Cir.), *cert. denied,* 434 U.S. 966, 98 S.Ct. 54 L.Ed.2d 452 (1977).

56 L.Ed.2d 18 (1978) (no immediate appeal of denial of speedy trial claim under Sixth Amendment because determination of merits of claim depends on circumstances surrounding trial). Second, the entitlement of Yellow Freight and Duncan Ceramics to an indictment before prosecution is wholly collateral to and independent of the issue of their guilt on the underlying charges. Finally, the claim involves a right that would be irretrievably lost if the defendants were forced to stand trial before appeal. One purpose of the indictment clause is to shield defendants from unwarranted prosecutions for serious crimes. *Wood* v. *Georgia,* 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962); *Stirone* v. *United States,* 361 U.S. 212, 218 & n.3, 80 S.Ct. 270, 273 & n.3, 4 L.Ed.2d 252 (1960); *Gaither* v. *United States,* 413 F.2d 1061, 1066 (D.C. Cir. 1969); *United States* v. *Cox,* 342 F.2d 167, 170 (5th Cir.), *cert. denied,* 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965); *see also United States* v. *Basurto,* 497 F.2d 781, 785 (9th Cir. 1974). Like the contentions held immediately appealable in *Abney* and *Griffin,* therefore, this claim "involves a right to be free from prosecution itself, rather than merely to be free from subsequent conviction." *Griffin,* 617 F.2d at 1345; *see Abney,* 431 U.S. at 660-62, 97 S.Ct. at 2040-41, we therefore deny the motion to dismiss with respect to the claim.[3]

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[3] *In re Fendler,* 597 F.2d 1314 (9th Cir. 1979), does not require a different result. That case involved a denial of a petition to conduct a voir dire of grand jurors regarding possible bias. Such attacks on the procedure followed by a grand jury are ordinarily not immediately appealable. The present case, on the other hand, involves a claim that trial itself cannot proceed except according to a grand jury indictment.

The issue of the immediate appealability of indictment clause claims was presented, but apparently not decided, in *Helstoski* v.

(footnote continued)

C. *Due Process Contention.*

Finally, Yellow Freight and Duncan Ceramics contend that, even if they may be prosecuted by information, they are entitled to a preliminary hearing on the issue of probable cause. They assert that the trial itself will deprive them of protected liberty and property interests and argue that due process requires a hearing. This contention fulfills the first two elements of the *Abney* test. It has been fully disposed of by the trial court and is separable from the principal issue of guilt or innocence. At first blush, it also appears to meet the third element of the *Abney* test. If review must await final judgment, the defendants will have been subjected to a trial from which they assert they are constitutionally immune.

Since *Abney,* many appeals from pretrial orders have come before us. In these appeals defendants have demonstrated remarkable ability to frame almost any argument to meet the *Abney* test. Because the filing of an appeal allowable under *Abney* deprives the trial court

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(footnote continued)

Meanor, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979). A former congressman was charged by indictment with soliciting money from aliens by return for introduction of private bills in Congress. The indictment referred to legislative acts of the congressman. He claimed that trial according to the indictment would violate the speech or debate clause and that trial not according to the indictment would violate his indictment clause "right to be tried only on an indictment in precisely the form issued by a grand jury." *Id.* at 505, 99 S.Ct. at 2448. The Supreme Court, characterizing the claim as arising under the speech of debate clause, ruled that his claim was immediately appealable. *Id.* at 506-08, 99 S.Ct. at 2448-49. *Helstoski* does not squarely stand for the proposition that indictment clause claims are immediately appealable because the Court may have assumed that trial would proceed according to the indictment.

of jurisdiction to proceed with trial, *Moroyoqui* v. *United States,* 570 F.2d 862, 864 (9th Cir. 1977), *cert. denied,* 435 U.S. 997, 98 S.Ct. 1651, 56 L.Ed.2d 86 (1978), defendants delay their trial when they pursue *Abney* appeals. So that defendants need not completely forego speedy trial to seek vindication of the rights protected by *Abney,* we must adopt procedures to dispose of these appeals as quickly as fair consideration permits.

We therefore hold that, in order to show that his or her claim involves an important right requiring immediate review, a defendant must first identify a valid principle of law that can apply to his or her case. *See United States* v. *Perkins,* 433 F.2d 1182, 1183, 1186 (D.C. Cir. 1970) (dismissing *Abney*-type appeal because issues posed were insubstantial). The defendant must then show that the principle confers an important right and that the right can only be preserved by immediate review. Failing such showings, an *Abney* appeal will not survive a motion for dismissal for lack of appellate jurisdiction.

Despite defendants' artful pleading, their final claim involves no important right that would be lost if we refuse immediate review. Although a defendant arrested or otherwise restrained has a Fourth Amendment right to a preliminary hearing on the issue of probable cause, absent restraint a prosecution may be maintained without any finding of probable cause. See *Gerstein* v. *Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), where after holding that an arrested defendant is entitled to a judicial determination of probable cause independent of the prosecutor's decision to file an information, *id.* at 117-18, 95 S.Ct. at 864-65, the Court continued:

> In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint

> of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck* v. *Washington,* 369 U.S. 541, 545, [82 S.Ct. 955, 957, 8 L.Ed.2d 98] (1962); *Lem Woon* v. *Oregon,* 229 U.S. 586, [33 S.Ct. 783, 57 L.Ed. 1340] (1913).

Id. at 118-19, 95 S.Ct. at 865.[4] Thus, defendants have identified no interest cognizable under the due process clause. Because defendants assert a claim based upon a legal theory foreclosed by the Supreme Court, their claim does not involve an "important right," 431 U.S. at 658, 97 S.Ct. at 1039, the third element of the *Abney* test is not met, and the district court's denial of this claim is not immediately appealable.[5]

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[4] *See also* 420 U.S. at 125 n.26, 95 S.Ct. at 869 n.26 ("Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty *other than the condition that they appear for trial.*") (emphasis added); *United States* v. *Pickard,* 207 F.2d 472, 474-75 (9th Cir. 1953) (absent arrest, prosecution by information may proceed without oath or affirmation of probate cause); *Church* v. *United States,* 412 F.2d 836, 838 (9th Cir. 1969) (same). *But cf. United States* v. *Millican,* 600 F.2d 273, 276-77 (5th Cir. 1979) (holding that a summons is sufficient restraint to invoke probable cause requirement, where failure to appear on summons may result in issuance of warrant), *cert. denied,* 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 598 (1980).

[5] The rule we establish today may apply in other circumstances. For example, it might permit dismissal of *Abney* appeals founded on statutes not in force or on overruled cases. We find it unnecessary to define the contours of this rule, other than to state that defendants' indictment clause contention is not. As future cases affect the merits

(footnote continued)

II. *Prosecution of Corporations by Information*

Yellow Freight and Duncan Ceramics contend that because they stand charged with offenses punishable by two years in a penitentiary, they may be proecuted not by information, but only by grand jury indictment. The Fifth Amendment states that "[n]o person shall be held to answer for . . . [an] infamous crime, unless on . . . indictment of a Grand Jury." Relying on United States Supreme Court pronouncements that infamous crimes are those "punishable by imprisonment in a penitentiary," *e.g.*, *Green* v. *United States,* 356 U.S. 165, 183, 78 S.Ct. 632, 642, 2 L.Ed.2d 672 (1958), defendants contend that they have been charged with infamous crimes and may not be prosecuted except on grand jury indictment.

In response, the United States notes that both defendants are corporations and therefore not amenable to imprisonment. It accordingly contends that this prosecution may proceed by information alone. *See United States* v. *Macklin,* 389 F.Supp. 272, 273 (E.D.N.Y.), *other holdings aff'd,* 523 F.2d 193 (2d Cir. 1975).

We agree with the United States that potential confinement in a penitentiary of some violators of a criminal

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(footnote continued)

of particular claims, of course, the immediate appealability of those claims may change.

We have recently adopted an internal procedure for expedited disposition of *Abney* appeals on their merits under 9th Cir. R. 6(h). *United States* v. *Miranda-Parra,* ____ F.2d ____, ____, ____ (9th Cir. 1980); *see also Abney,* 431 U.S. at 662 n.8, 97 S.Ct. at 2042 n.8. Using this procedure, we disposed of the appeal in *Miranda-Parra* in less than five weeks. Although the 6(h) procedure seems generally preferrable, our ruling today ensures that a motions panel of this court can dispose of frivolous *Abney* appeals even when 6(h) has not been invoked.

statute does not render all violations of that statute "infamous." Congress may impose different punishments upon different classes of criminals. It has done so in the provisions of the Elkins Act here in question: the Act by its terms limits penitentiary confinement to individuals.[6] We do not, however, rest our holding upon this express recognition by Congress of practical limitations on punishment for corporate crime. Where, as in this case, a criminal statute makes violations punishable by imprisonment in a penitentiary, corporate violations of that statute are not automatically made infamous crimes by the possible infliction of such punishment on individuals.

Defendants argue that such a result completely deprives corporations of the right to grand jury protection. We disagree. The possibility of imprisonment in a penitentiary is only one index of whether a crime is infamous.[7] Aside

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[6] While the Elkins Act imposes a $1000 to $20,000 fine on "[e]very person or corporation" who knowingly gives or receives a concession, the provision imposing imprisonment applies only to "any person, or any officer or director of any corporation." 49 U.S.C. § 41(1) (1976). Thus, by its own terms the imprisonment provision of the Elkins Act does not apply to corporations.

[7] The punishment attached to a crime is relevant to the determination of infamy because it indicates the character of the crime as perceived by Congress and the public. *See Mackin* v. *United States,* 117 U.S. 348, 351, 352-53, 354. 6 S.Ct. 777, 778, 779, 780, 29 L.Ed. 909 (1886) (in light of common perception, crimes punishable by confinement to a penitentiary are infamous); *Ex parte Wilson,* 114 U.S. 417, 427-28, 5 S.Ct. 935, 940, 29 L.Ed. 89 (1885) (for similar reasons, crimes punishable by confinement at hard labor are infamous). In the case of crimes by individuals, the possibility of imprisonment for more than one year, and therefore in a penitentiary, remains the most reliable index of infamy. *See United States* v. *Driscoll,* 612 F.2d 1155, 1156 (9th Cir. 1980). It would be extremely rare for a crime by an individual that did not carry infamous punishment to be made infamous by some other factor.

from test of infamy that hinge on the possibility of punish- to which corporations are not amenable, the Supreme Court has occacsionally suggested other incidents of infamy. For example, in *Ex parte Wilson,* 114 U.S. 417, 423-24, 5 S.Ct. 935, 938, 29 L.Ed. 89 (1885), the Court suggested that the Fifth Amendment may require indictment for "crimes infamous in their nature, independently of the punishment affixed to them."[8] In *Wilson* the Court also indicted that a congressional declaration of infamy might suffice. *Id.* at 426, 5 S.Ct. at 939; *see also United States* v. *Waddell,* 112 U.S. 76, 82 5 S.Ct. 35, 38, 28 L.Ed. 673 (1884) (remanding to the circuit court to determine the "very serious question whether *this* crime is not made an infamous one by the language of the statute," which precluded violators from holding office; considered separately from punishment, the Court thought the language was "an indelible disgrace affixed to the party convicted"); *Ullmann* v. *United States,* 350 U.S. 422, 451 n.5, 76 S.Ct. 497, 513 n.5, 100 L.Ed. 511 (1956) (Douglas, J., dissenting). In addition, crimes punishable at common law by civil disabilities were deemed infamous. The indictment clauses of several state constitutions are interpreted to require indictment for such crimes, *e.g., Elkin* v. *Commonwealth,* 269 Ky. 6, 8, 106 S.W.2d 83, 84 (1937), and at least one federal court has suggested that such crimes are infamous within the meaning of the Fifth Amendment, *Hunter* v. *United States,* 272 F. 235, 238 (4th Cir.), *cert. denied,* 257 U.S. 633, 42 S.Ct. 47, 66 L.Ed. 407 (1921).

Since we hold that imposition of potential imprisonment on individuals violating a criminal statute does not

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[8] *But see Weeks* v. *United States,* 216 F. 292, 298 (2d Cir.) (infamy depends solely on character of punishment), *cert. denied,* 235 U.S. 697, 35 S.Ct. 199, 59 L.Ed. 431 (1914); *Low* v. *United States,* 169 F. 86, 89 (6th Cir. 1909) (same; dictum).

of itself make corporate violations of the same statute infamous crimes, the only remaining question is whether another factor renders the crimes charged in this case infamous. The crimes charged are not made infamous by the penalties attached to them, because those penalties are only fines. A fine, regardless of its amount, cannot be infamous punishment. *See United States* v. *Armored Transport, Inc.*, slip op. at 323-24, ... F.2d ..... at ....., ... (9th Cir. 1980). Nor is this crime inherently infamous The class of inherently infamous crimes, if it exists at all, would encompass only the most serious *mala in se*. Regulatory crimes, such as those charged in this case, are not inherently infamous.

The only perceptible basis for holding these crimes infamous would be that Congress has declared these crimes infamous by attaching the penalty of imprisonment in a penitentiary to similar crimes committed by individuals. The history of the statutes involved precludes such a basis. Congress enacted the Elkins Act in 1903. In place of the present provisions for penitentiary sentences, the original Act provided:

> In all convictions . . . for offenses under [various acts regulating interstate commerce] . . . no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished.

Elkins Act, ch. 708, § 1, 32 Stat. 847, 847 (1903). The present provision was added three years later by the Hepburn Act, ch. 3591, § 2, 34 Stat. 584, 588 (1906). Although the Hepburn Act originated in the House, its restoration of the penalty of imprisonment was the result of a Senate amendment. The floor debate on the amendment indicates that the amendment was designed to enforce

more effectively the ban on concessions, rather than to brand the giving of rebates with a special mark of infamy.[9] The violations charged here are not infamous. crimes. We affirm the district court's denial of defendants' motion to dismiss.

In summary, we grant the motion to dismiss this appeal with respect to the defendants' Elkins Act and due process claims. With respect to the defendants' indictment clause claim, the motion to dismiss the appeal is denied; because the violations charged are not infamous crimes, however, we affirm the district court's rejection of that claim.

Dismissed in part and affirmed.

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[9] 40 Cong. Rec. 6620-28 (1906). There were actually three competing proposals on the Senate floor to reestablish the penalty of imprisonment. Throughout the floor debate, various speakers stressed the deterrent purpose of the penalty, thus negating any inference that Congress intended the penalty as an expression of the infamous character of the crime. *But see* 40 Cong. Rec. 6625 (statement of Sen. Daniel) (suggesting a retributive purpose). Any assertion that the amendment rendered granting of concessions an infamous crime is further undercut by the fact that all three proposals denominated the offense a misdemeanor.